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No. 1429

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

S. R. PRICE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

POINTS AND AUTHORITIES OF APPELLANT.

BERT SCHLESINGER,
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STATEMENT OF FACTS.

Appellant prosecutes this appeal from a final judgment of conviction of the United States Court of China. (See Act creating United States Court for China, June 30, 1906, Ch. 3994, Stat. L. 814, Sec. 3.)

On July 25th, 1906, one S. R. Price, a member of the bar of the United States, residing in Shanghai, China, was arrested on three complaints, charging him (1) with unlawfully threatening to shoot one A. Jovansen; (2) with carrying two revolvers within the limits of the Settlement contrary to Municipal

By-Law No. 37; (3) with unlawfully threatening to shoot one J. E. Farrell (Tr. pp. 30-31-32).

Appellant was tried before James L. Rogers, Consul General of the United States, acting judicially. Testimony was introduced by the prosecution in support of the charges and by the defendant in his own behalf. At the conclusion of the testimony the Consul General dismissed the case and discharged the defendant (Tr. pp. 26-27-28).

Thereafter, on the same date, appellant was rearrested on a charge arising from the same alleged criminal transaction and brought before the same Consul General acting as a Committing Magistrate. Relying upon his previous acquittal, the appellant made no defense and was bound over to the United States Court for China, his bond being fixed at twenty-five hundred ($2500.00) dollars (Tr. pp. 17-18-19-20-23).

Subsequently, on December 29th, 1906 some five months after his first trial and acquittal, the United States District Attorney for China filed an information in the United States Court for China charging the appellant with the crime of assault committed as follows:

"That S. R. Price, an American citizen, on the "24th day of July, 1906, in the City of Shanghai, "China, with *a dangerous weapon*, to wit: a *thirty-*"*two (32) caliber Automatic Colts revolver,* on one "A. Jovansen did wilfully make an assault, by "pointing the said revolver at the said Jovansen in

" a threatening manner, and that by so pointing the " said revolver at the said Jovansen, did then and " there put the said Jovansen in great fear of bodily " harm, against the peace and contrary to law." (Tr. p. 25.)

Upon his arraignment in the United States Court for China, the appellant filed a plea in bar setting out that the charge on which the defendant was first tried and acquitted and the information now filed against him in this Court arose identically from the same circumstances and the offense charged is the "same". The plea was in due form and verified by the appellant (Tr. pp. 26-27-28).

No issue was joined on the plea, but counsel for the United States admitted the truth of "the allegation of fact" contained therein. The Court overruled the plea to which an exception was taken (Tr. p. 182). The plea being denied, the case was thereupon set down for trial. Defendant was found and adjudged guilty and sentenced to six months' imprisonment in the prison for American convicts at Shanghai, China. The case was tried without a jury and the Court rendered a written judgment and found certain facts (Tr. 128).

The *judgment* of the Court shows that Mr. Price took a drive in the country with a respectable married woman who was visiting Shanghai for the purpose of meeting her husband. She was residing at the same hotel where Mr. Price was a guest. Price carried with him two new revolvers, together with sev-

eral hundred cartridges, for the purpose of target shooting. They were returning to the city. The revolvers had been emptied,—one of them was in the bottom of the carriage and the other Mr. Price had put in his pocket,—*both were unloaded.* On their way home they stopped at a respectable roadhouse and requested refreshments. The Chinese boy in attendance wrongly conceived the idea that Mrs. Stewart was an improper person and refused to serve them. Mr. Price was about to depart when Mrs. Stewart sought out Mr. Jovansen and remonstrated. Mr. Price, believing from the excitable manner of Jovansen, that he was insulting Mrs. Stewart, went to her assistance. As he approached, Mr. Jovansen picked up a knife, which was lying on the table, and took a step towards Mr. Price. Price, with the object of frightening off Jovansen, pulled out an empty revolver and pointed it at him. Jovansen dropped the knife and crawled under a table, whereupon Mr. Price and his companion left the hotel. Mr. Price did not lay his hands on Jovansen. There was no shooting and absolutely no assault or battery. These are the facts as appearing in the judgment of the Court. The Court concludes its recital of the facts with the statement:

"The testimony indicates that the revolvers were "not loaded at the time of the occurrence of the "consideration" (Tr. p. 133), and "the fact that the "revolver was unloaded does not change the aspect "of the case" (Tr. 134).

That the difficulty, whatever it may be termed, was brought about through the actions of Mr. Jovansen no one can doubt. After conviction, defendant filed a motion for appeal and with it an assignment of errors,—appearing for himself in both documents.

By an affidavit filed by the Clerk of the United States Court of China with the Clerk of this Court, endorsed, affidavit of F. E. Hinkley, Clerk United States Court for China, relative to omission from transcript of record, it appears that after allowance of appeal, bail was denied. Subsequently Price was admitted to bail by order of this Honorable Court.

ARGUMENT.

Appellant relies on two grounds for the reversal of the judgment.

I.

The instrument of crime described in the information as a *dangerous weapon,* to wit, a thirty-two caliber Automatic Colts revolver, was *unloaded,* and at the time of the alleged assault incapable of being exploded. This point is covered by Assignment 7 (Assignment of Errors, Tr. 142.)

By Section 4083 of the Revised Statutes of the United States, Ministers and Consuls were invested with judicial authority as regards the punishment of crime, and by certain succeeding sections were authorized and empowered to arraign and try any citi-

zen of this country for offenses committed within their respective jurisdictions, and to impose sentence upon such offenders.

Section 4086 of the Revised Statutes refers to the manner in which this jurisdiction shall be exercised, and states that it shall in all cases be enforced in accordance with the laws of the United States, and where such laws are not adapted to the object or do not furnish suitable remedies, the *common law* and the law of equity and admiralty shall be extended, and if appropriate remedy cannot be thus obtained, the Ministers and Consuls in those countries respectively shall, by decrees and regulations, supply such defects and deficiencies.

Under the act creating the United States Court for China (June 30th, 1906; Chapter 3934-34-184) the jurisdiction of the Consuls and Ministers was materially curtailed and given over to the United States Court for China, it being provided in Section 1 of the Act that the United States Courts "for " China have exclusive jurisdiction in all cases and " judicial proceedings whereof jurisdiction may now " be exercised by the United States Consuls and " Ministers by law", except so far as the jurisdiction is qualified by Section 2 of the Act.

The offense for which defendant was convicted is not embraced within any Federal statute. It may be considered, for the purposes of this case, a common law offense, a mere misdemeanor with unfixed and unsettled penalty. In the case at bar the Court

arbitrarily fixed the punishment at six months' imprisonment.

Assuming that the United States Court for China had full and complete jurisdiction over the appellant with respect to the offense of which he was convicted, we repeat that under the conceded facts of the case, the appellant was not guilty of the offense set out in the information, namely: *"Of an assault with a dangerous weapon." Pointing at a person an unloaded fire-arm of whatsoever size or dimensions does not constitute an assault.*

The majority of the earlier cases hold that to present or aim an unloaded gun at a person within shooting distance in such a manner as to terrify him, he not knowing that the gun is not loaded, will not support an action for criminal assault, although it may support a civil action for damages.

Klein v. State, 9 Ind. Appeal 365;
State v. Napa, 6 Nev. 113;
McKay v. State, 44 Tex. 43;
Reg. v. Baker, 1 C. & K. 254 (47 E. C. L. 254);
Reg. v. James, 1 C. & K. 530 (47 E. C. L. 530);
Block v. Barnard, 9 C. & P. 626 (38 E. C. L. 259);
Reg. v. Oxford, 9 C. & P. 525 (38 E. C. L. 208);
Fastbinder v. State, 42 Ohio St. 341.

In speaking of this question, Justice Sommerville in Chapman v. State, 56 Am. Rep. 42, said:

"On this question the adjudged cases, both in this country and in England, are not agreed, and like difference of opinion prevails among the most learned commentators of the law. We have had occasion to examine these authorities with some care on more occasions then the present, and we are of the opinion that the better view is, that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, *such an assault as can be punished criminally, although it may sustain a civil suit for damages.* The conflict of authorities on this subject is greatly attributable to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's right to live in society without being put in fear of personal harm, and can often be sustained by proof of a negligent act resulting in unintentional injury. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do *bodily harm* to another by violence."

No difference of opinion, however, prevails among the more modern cases, and in the case of State v. Godfrey, 20 Pac. Rep. 626, the defendant was indicted for being armed with a dangerous weapon, to wit: a Winchester rifle, and assaulting H. J. Chrisman with such a rifle. The Court says:

"The evidence of the assault tended to prove that the defendant, when not less than 30 yards nor more than 70 yards from said Chrisman, pointed a Winchester rifle at him and threatened to kill him if he did not turn back. His words were: 'Turn back, you dirty son of a b—ch, or I will kill you.' The transcript shows that there was no direct evidence that the gun

was loaded or that the defendant cocked it or did anything but point the gun at Chrisman and use the language above quoted. There was evidence tending to prove that Chrisman was frightened and fled from the defendant."

"The Court upon the first instruction given by the Court to which an exception was taken, in effect told the jury that if the defendant pointed the gun at Chrisman under the circumstances enumerated, the defendant was guilty no matter whether the gun was *loaded or not.* This was equivalent to saying that it is a felonious assault to point an *empty gun* at another, whereby he is put in fear and flees. Such an act no doubt deserves the severest reprehension, but unless it constitutes an assault the conviction cannot be sustained, no difference what view we may take of the other questions presented."

The Court further says:

"Manifestly an unloaded gun in the hands of the defendant four or five rods away from Chrisman was a harmless implement from which no personal injury could possibly have been inflicted upon Chrisman. Without the use of a *dangerous weapon,* the defendant could not commit the crime charged and the weapon was not dangerous in a legal sense, unless at the time of its use it was capable of producing death or great bodily harm."

In Klein v. State, 36 N. E. 763, the Court said:

"Assuming, as we must, that there was sufficient evidence for the conclusion that Klein drew a pistol and pointed it at Thomas with threats to use it upon him, there was still a fatal lack of evidence to establish an assault. There was not a scintilla of evidence that the weapon was *loaded* and capable of *inflicting bodily harm.*

> * * * A person standing on the opposite side of even a very narrow street from another, pointing an *unloaded pistol* or a *pistol* not *shown* by any evidence to have been *loaded,* and *threatening* to use it upon him, may be guilty of an offense under Section 68 of the Revised Statute 1894, but that offense is not an assault, neither is it embraced in the charge contained in the affidavit and information." (Italics ours.)

In the very recent case of People v. Sylva, 143 Cal. 62, this same question arose. There was no attempt to use the weapon, and it was not in fact fired. The Court said:

> "The only serious dispute concerning any evidence in the case was over the question whether or not the gun was loaded and whether or not there was any attempt to discharge it. Under these circumstances it must be conceded that if the gun was not loaded there was no assault either with a deadly weapon or otherwise. Pointing an unloaded gun at another, accompanied by a threat to discharge it without any attempt to use it except by shooting, does not constitute an assault."

We also call the Court's attention to the case of

> Chapman v. State, 56 Am. Rep. 42;
> McKay v. State, 44 Tex. 43;
> Burton v. State, 30 Am. Rep. 146.

We might continue to cite cases to the same effect.

This question was considered by the lower Court (see Judgment, Tr. p. 35), the Court disposing of it in the following way: "The fact that the revolver " was *unloaded* does not change the aspect of the

" case," and quoting from Bishop's New Criminal Law:

> "There is no need for the party assaulted to be put into actual peril if only a well founded apprehension is created, for his suffering is the same in one case as in the other, and the breach of the peace is the same."

And Bishop's New Criminal Law is cited. The learned Judge, also quoting from a Scotch case, says: " The presenting of a pistol, even if it were not " loaded, providing the party at whom it was pre- " sented supposed it to be loaded, was undoubt- " edly, in law, an assault." And the Court further says: "It is not the secret intent of the party nor " the undisclosed fact of his ability or inability to " commit a battery that is material, but what his " conduct and the attending circumstances denote at " the time to the party assaulted. If to him they " indicate an attack, he is justified in *resorting* to " *defensive action.* It is the outward demonstration " that constitutes the crime."

It is true that if attending circumstances denote an attack, the party is justified in resorting to defensive action. The case at bar is not one of a resort to the law of self-defense. Undoubtedly a man is justified in acting on appearances. The single case cited by the learned Court is not applicable to the case at bar for the obvious reason that this is not a case of *acting in* self-defense.

As is said in 3rd volume of Cyc. of Law and Procedure, the weapon, however, must be loaded, al-

though it is immaterial with what, provided it be fired within the distance it would carry.

In the case of U. S. v. Jackson, decided by this Court, 102 Fed. 485, it seems to be conceded that the crime of an assault with a deadly weapon is not made out unless the evidence shows that the revolver was loaded.

Justice Hawley says:

> "The remaining point, that there was no evidence that the revolver was loaded, is equally without merit. It is true that there was no positive or direct evidence that it was loaded. How could there be? It was not discharged. Jackson kept possession of it, and got away as speedily as possible after Smith was shot. Whether it was loaded or not was a question of fact, to be determined by the jury. The testimony was circumstantial. The jury had to infer the fact from all the testimony and the surrounding circumstances. What was the object or purpose of Smith and his associates in going down to the wharf What was the natural inference to be drawn from the acts and conduct of Jackson at or about the time he drew and pointed his gun on Tanner? The jury heard this testimony, and were authorized to draw the inference therefrom that Jackson's revolver was loaded."

In the case at bar, the Court was not authorized to draw any inference that the pistol was loaded. On the contrary the Court finds that the pistol was not loaded. "The testimony indicates that the revolver " was not loaded at the time of the occurrence under " consideration" (Judgment of Court, Tr. p. 33).

The remaining ground relied on for reversal is:

II.

The United States Court for China *erred in not sustaining appellant's plea of once in jeopardy.*

The verified plea of the defendant stated: "That "the charge on which the defendant was first ar- "raigned, tried and acquitted and the information "now filed against him, arose identically from the "same circumstances and the offense charged is the "same." (Tr. p. 27-28) (Assignment 1 Tr. p. 138)

The plea set forth fully the charge upon which he had been tried and acquitted and states: "That "testimony was given by the prosecution that on "July the 24th, 1906, at Shanghai, China, defendant "assaulted one A. Jovansen, by pointing at him an "automatic Colts revolver in a threatening manner, "and testimony was also given in support of the "other charges."

The plea shows an arrest, examination and discharge after judicial inquiry into the merits of the case upon a valid complaint. The plea was not traversed or demurred to, counsel for the prosecution stating to the Court that there was no dispute about the allegations of fact contained in the plea. (Tr. p. 182)

The allegations of fact having been admitted, the only question remaining is, was the Consul General invested with jurisdiction to hear, determine and pronounce a judgment of discharge with respect to the charge embraced in the complaint before him.

Although the act of June the 30th, 1906, creating the United States Court for China, deprived the Consular Court of some of its jurisdiction, Sec. 2 provided that the Consulars of the United States in the cities of China to which they are respectively accredited, shall have the same jurisdiction as they now possess * * * and in criminal cases where the punishment for the offense charged cannot exceed by law one hundred ($100.00) dollar fine or sixty (60) days imprisonment or both and shall have power to arrest, examine and discharge accused persons or commit them to the said Court.

It is further provided that from all final judgments of Consular Court, either party shall have the right of appeal to the United States Court for China. Under this act the Consular Court is given jurisdiction to finally dispose of certain police cases and may act as an examining of committee magistrate in other criminal cases. The extent of his final criminal jurisdiction is defined and limited to such cases where the fine is fixed by law to one hundred ($100.00) dollars and imprisonment not to exceed sixty (60) days.

It seems to be conceded that the Consular Court had full and complete jurisdiction over the appellant with respect to the offenses upon which he was tried and acquitted.

Appellant was tried before the Consular Court on three charges, (1) with carrying two revolvers within the limits of the settlement, contrary to Municipal

By-Law No. 37, at 5:15 P. M. on July 24th, 1906; (2) with unlawfully threatening to kill A. Jovansen; (3) unlawfully threatening to kill G. E. Farrell at the same time and place. These charges and the charge on which appellant was convicted arose from the same transaction. Splitting it up and calling each part a separate and distinct offense, does not make certain separate and distinct offenses. The jurisdiction of the Consular Court over these minor offenses for which he was acquitted is not disputed (Tr. p. 35).

The learned judge stating, "from the allegation of " the plea it is evident that the accused was not " placed on trial on a valid information since it ap- " pears that the information contained three dis- " tinct charges; in no one of which was defendant " charged with assault.

" The Consul General has not jurisdiction of the " *offense charged* in the information on which the " *accused* is *now* on *trial*. The proceedings before him, " therefore, cannot be pleaded in bar to *this* action" (Tr. p. 35). His Honor questions the validity of the information but not the question of jurisdiction. The fact that the misdemeanor charges were included in one complaint did not render the complaint invalid. The defendant might have objected to the joinder of these offenses in one complaint, it surely does not rest with the prosecution to complain.

Therefore, it may be taken as admitted, that defendant was duly and regularly tried before the

Consular Court of Shanghai for certain misdemeanors. That these misdemeanors arose out of a single transaction,—that he was, after full trial before the Consular Court, acquitted of these misdemeanors,—that subsequently he was tried in the United States Court for China for an offense called "an assault with a dangerous weapon", to wit: An unloaded pistol. This offense arose from the same transaction.

The information filed against the defendant by the United States Attorney, charged him with the crime of assault by pointing at A. Jovansen, a Colts Automatic revolver in a threatening manner and putting him in great fear of bodily harm (Tr. p. 25).

The finding of the Court appearing at the end of his elaborate judgment is, that on the 24th day of July, 1906, at Shanghai, China, the defendant with a dangerous weapon, to wit: a thirty-two (32) caliber Colts Automatic revolver, assaulted A. Jovansen by pointing it at him in a threatening manner.

The identity of the acts involved cannot be questioned and we contend that upon defendant's acquittal before the United States Consular Court upon the three charges he could not have been legally prosecuted for the same offense or an offense arising from the same transaction before another tribunal. To have again put him upon trial was to violate a fundamental rule of law.

This precise question arose in the recent case of People v. McDaniel, 137 Cal. 192. Appellant was tried upon an information for assault with a deadly weapon with intent to commit the crime of murder; was found guilty and sentenced to fourteen years imprisonment. The defendant pleaded a former conviction of the offense charged. In support of his plea of former conviction the defendant offered in evidence the records of the Justice of the Peace, showing in substance that on February 10th, 1901, Bessie McDaniels (the person upon whom the information in the action charged the assault with intent to murder to have been committed) filed her complaint with said Justice, charging the defendant with having committed a *battery upon* her, on said 1st day of February, 1901; that a warrant was issued thereon under which he was arrested; that he pleaded guilty and on the 12th he was sentenced by said Justice of the Peace to imprisonment in the County Jail of Fresno County for the term of one hundred and seventy-five (175) days. This testimony was ruled out.

The Court says:

> "The prosecution before the Justice of the Peace was for the same acts of the defendant, but the complaint and judgment omitted the alleged intent to murder charged in the information."

The cases are then reviewed, the Court saying:

> "In Regini v. Elrington (9 Cox, C. C. 86a), the Court said: 'It is a fundamental rule of

law that out of the same facts a series of charges shall not be preferred.'

"In the case v. Chenault, 55 Kansas 326, the defendant was charged by information in the District Court of Wyandotte County for an assault with intent to kill, was put upon his trial, but the Jury was discharged for sufficient cause and the case went over. Afterwards he was prosecuted in the Court of Common Pleas on a charge of assault with intent to rob, the two transactions being identical, the only difference in the two informations being that a different *criminal purpose* is charged.

"It was held that only one prosecution can be maintained for the same assault whatever the purpose may have been.

"In Moore v. the State, 71 Ala. 307, it was held: 'A single crime cannot be split up or subdivided into two or more indictable offenses, that to an indictment for assault with intent to murder, a plea of a former conviction of an assault and battery with a stick in the County Court based on the same criminal act, is good, although the offense charged in the indictment is a *felony,* and for the offense for which there was a former conviction is merely a misdemeanor.' The Court said: 'A conclusive reason for the soundness of the view to our mind is,—that if a defendant has been tried for the smaller offense whether convicted or *acquitted* it is immaterial, and he is afterwards put on trial for the *larger,* he is twice in jeopardy for the smaller offense.'

"In Jackson v. State, 14 Ind. 327, it is said: 'The State cannot split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.'

"'All offenses', says the Court in People v. McDaniels, 137 Cal. 197, 'such as battery, may-

hem, rape, robbery, etc., as well as assaults with intent necessarily include an assault, and it is now generally conceded that a conviction of a higher offense is necessarily a conviction of the assault included in it, and it would seem to follow logically as well as by construction, that a conviction or acquittal of any of the included offenses must bar a prosecution of the higher, since the higher cannot be afterwards prosecuted without opening the door for a second conviction or a conviction of an offense for which the defendant had before been tried and acquitted. It is well settled that a conviction of a *lower* included offense is an acquittal of all higher offenses included in the indictment or information and where such conviction for a lower offense is set aside and a new trial granted even upon the motion of a defendant or upon appeal, he cannot be convicted of any higher offense than that of which he was first found guilty. If an acquittal can have such effect, much more strongly it would be held that a prior convicton of any included offense shall bar a subsequent prosecution for a higher offense included in the same transaction.' "

Bishop in his New Criminal Law, Sec. 1058, says:

"That by the general and better doctrine a conviction or acquittal of *common assault* will bar proceedings for an assault, with intent to do bodily harm and other assaults aggravated in like manner."

It has been supposed that if the tribunal trying the less offense has no jurisdiction over the higher, —the case will be different; yet there does not seem to be any just foundation for the distinction. The fact that one has been in jeopardy for a lower

offense is true equally whether the Court had *authority* to *try the higher or not.*

His Honor, Judge Wilfley, takes a directly contrary view. He states: "The Consul General has "not jurisdiction of the *offense charged in the in-*"*formation* on which accused is now on trial" (Tr. p. 135).

One of the offenses for which appellant was acquitted was carrying *two revolvers within the limits of the Settlement, contrary to Municipal By-Laws No. 37* (Tr. p. 27.)

The learned Court does not seem to question that the Consul General had jurisdiction of the minor or lesser offenses upon which appellant was tried and acquitted. A Justice of the Peace would not have the right to try a man upon a charge of assault with intent to commit murder,—he could act only as a committing magistrate and hold or discharge the defendant. He could try a case involving the charge of battery and render a final judgment.

On the charge of assault with a dangerous weapon, the Consul General acted as a committing magistrate (Tr. pp. 23-35). In the minor charges, he acted as a trial Judge and rendered final judgment (Tr. pp. 26-27-34-35).

The Court in People v. McDaniels, 137 Cal. 192, says:

> "All criminal prosecutions are by the State which is a single entity. It may choose its own forum, and determine for what particular

> offense it will prosecute the citizen for a violation of the criminal law. It cannot complain if it has made an unwise selection, but having made *its selection* and inflicted the *penalty,* it has imposed for such violation the constitution interposes for the prosecution of the accused and declares that he will not be twice put in jeopardy for the same *offense* and this being for the benefit and protection of the accused is to be liberally construed."

In People v. Defoor, 100 Cal. 155, it was held that ~~same~~ one offense is a necessary element in and constitutes an essential part of another offense and both are in fact but one transaction a conviction or acquittal of one is a bar to the prosecution of the other, and that a conviction for an assault with intent to murder is a bar to a prosecution for mayhem committed during the assault.

The question involved here has been definitely settled by the United States Supreme Court in the case of Keppner v. The United States, decided in the October Term 1903 and reported in 24 Supreme Court Reporter 797. Keppner, a practicing lawyer in the Philippine Islands was charged with embezzlement. He was originally tried in the Court of First Instance without a Jury and acquitted. Upon appellate proceedings of the United States to the Supreme Court of the Philippine Islands, the judgment was reversed and he was found guilty. It was contended that the accused had been put in jeopardy a second time by the appellate proceedings in violation of the law against putting a person twice in

jeopardy for the same offense and contrary to the constitution.

In discussing the question Mr. Justice Day said:

> "In this Court it was said by Mr. Justice Miller in Ex parte Lange, 18 Wall 163 (21 L. Ed. 872): 'The common law not only prohibited a second punishment for the same offense, but went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether, in the former trial, he had been acquitted or convicted.'
>
> "And in as late a case as Wenyss v. Hopkins, L. R. Q. B. 378, it was held that a conviction before a Court of competent jurisdiction, even without a jury was a bar to a second prosecution.
>
> "In that case the appellant had been summarily convicted before a magistrate for negligently and by wilful misconduct driving a carriage against a horse ridden by respondent, and was afterwards convicted on the same facts for *unlawful assault*. It was held that the first conviction was a bar to the second.

In the same case it was said by Lush, J.:

> "I am of opinion that the second conviction should be quashed upon the ground that it violated a fundamental principal of law, that no person shall be prosecuted twice for the same offense. The act charged against the appellant on the first occasion was an assault upon the respondent while she was riding a horse on the highway and it therefore became an offense for which the appellant might be punished *under either of two statutes*. The appellant was prosecuted for the assault and convicted under one of the statutes and fined and he therefore cannot be afterwards convicted again for the same act under the other statute."

> "It is time that some of the definitions given by the text book writers and found in the reports, limit jeopardy to a second prosecution after verdict by a jury, but the weight of authority, as well as decisions of this Court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquittal."

District Judge DeHaven, in his learned opinion, in re Bennett, 84 Fed. Rep. 326, states the rule:

> "The right of a person after acquittal by a jury to be exempt from the jeopardy of being again placed on trial in the same Court and upon the same indictment for the identical offense of which he has been acquitted is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to the citizen, and unquestionably the guaranty of due process of law, found in the Fourteenth Amendment was intended among other things, to secure to the citizen this right, and deprives the State of authority to convict and punish a person for a crime of which he has been duly acquitted by a jury, when the fact of such former acquittal is made to appear to the Court before which he is again put in jeopardy for the same offense."

We respectfully submit that this case calls for a reversal with a direction to the lower Court to discharge the appellant.

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